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IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY PTY LTD D/B/A KIRBY ENGINEERING AND MMI GENERAL INSURANCE, LTD.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 78 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. In matters of significant interest to its members, AAR frequently

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[1] The parties have filed with the Court letters consenting to the filing of *amicus* briefs. No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

appears before Congress, administrative agencies and the courts on behalf of the railroad industry. Because of the railroad industry's significant participation in international commerce, this case, arising out of a shipment of cargo from Australia to Alabama, takes on relevance, and great interest, for AAR's member railroads.

The decision below has serious implications for the established commercial practices of not just petitioner, but for all large freight railroads, in an area that constitutes a significant and highly competitive sector of the railroads' business. This Court's disposition of the issues presented by petitioner will greatly influence railroads' ability to continue to conduct business in accordance with those practices, which are designed to facilitate fast, reliable movement of goods in international trade, and to assure that the terms of the carriage are well understood.

Should the Eleventh Circuit's decision be affirmed, a deeply troubling element of uncertainty and unpredictability will be injected into the efforts of railroads to manage risk and liability when participating in international commerce. Railroads would have no means of knowing what degree of liability they face when accepting goods in international commerce, and thus will be forced to react to such an outcome by seeking out alternative methods of arranging for their role in international transportation. This will lead to cumbersome, less efficient means of doing business, with the most likely recourse for railroads being to require indemnities from the parties from whom they accept freight. As such a result—including potential litigation over indenmity obligations—will be detrimental to both railroads and the international commerce in which they participate, AAR has a strong interest in amplifying the rail industry's perspective on this case in an *amicus* brief to this Court.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case of petitioner.

SUMMARY OF THE ARGUMENT

The erroneous decision below, which fails to hold a cargo owner to the contract entered into by the freight forwarder with whom the cargo owner entrusted its goods, will have a significant impact on railroads. Railroads actively participate in international commerce, moving cargo arriving from overseas by ocean carrier, primarily in containers, to final destination points in the United States. As a practical matter, railroads rarely do business directly with the overseas shippers of the cargo. Rather, they enter into arrangements with ocean carriers, often agreeing to ship large volumes of freight delivered by these parties. Well-established, economically efficient commercial practices characterize the through international transportation in which railroads participate.

The liability provisions of the Carriage of Goods by Sea Act, which were set forth in two bills of lading interpreted by the court below, establish a regime by which an ocean carrier's liability for damage to the lading is limited. These limits, which may be, and in this case, were, contractually extended to other carriers, allow carriers to offer low rates to shippers, who in turn obtain insurance to cover any excess risk. The court below interpreted the bills of lading, which clearly were meant to extend liability limitations, as not benefitting petitioner railroad, even though petitioner was an anticipated and indispensable party to the transportation required by the shipper. This ruling, which creates a windfall for the shipper's insurer, is based on notions of agency and privity which do not comport with commercial realities and sharply conflict with decisions of this Court. If the Eleventh Circuit's decision is affirmed, railroads will need to alter their practices in ways that are neither efficient nor practical, with

the consequence of upsetting established commercial norms in international shipping.

ARGUMENT

I. INTERMODAL TRANSPORTATION HAS FACILITATED EFFICIENT MEANS OF CONDUCTING INTERNATIONAL COMMERCE

Though characterized prosaically by the court below as a "bill of lading case", this case has significant ramifications for international commerce.[2] The decision of the Eleventh Circuit is grounded in technical rules that are not only contrary to established law, but also are unhinged from any consideration of policy or established commercial practices. Elevating such misplaced technicalities over the realities of international commerce, the Eleventh Circuit has called into question the logic behind the established methods of doing business that have developed over the years and have well-served participants in international commerce.

A. Intermodal Transportation is a Burgeoning Area of International Commerce in Which Railroads Play a Key Role

The circumstances out of which this case arose—the shipment of freight between continents by means of more than one mode of transportation—are ubiquitous. "Intermodal" transportation, typically involving the shipment of freight in containers or trailers, has experienced explosive growth since the 1950s, and today plays a vital role in the global economy. *See generally,* GERHARDT MULLER, *Intermodal Freight Transportation* (3d ed. 1995); DAVID J. DEBOER, *Piggyback and Containers* 159 (1992); DAVID R.

[2] A bill of lading is a document evidencing receipt of goods for shipment issued by persons engaged in the business of transporting or forwarding goods, which contains, among other things, the contract for carriage of the goods. BLACK'S LAW DICTIONARY 168 (6th ed. 1990).

MCKENZIE ET AL., *Intermodal Transportation—The Whole Story* 55-57 (1989). Containers predominate in international moves, and each year millions of containers, accounting for billions of dollars in transportation revenue, are transported from overseas to points in the United States.

The advent of containers has transformed international transportation into an integrated service, in which railroads play a prominent role. Significant use of containers by railroads began in the 1920s, while containerization of ocean cargo became widespread in the late 1950s. MCKENZIE at 32; MULLER at 12-13. During the 1960's, land and sea container transportation evolved from separate services to a combined, integrated service. MULLER at 17.[3] Shipping goods in standard-sized containers speeds the loading and unloading process and facilitates interchange between modes, with containers often unloaded off of ships at port directly onto flatcars designed for container transport. Import shipments, which typically consist of high-value items such as consumer goods, electronics, household products and clothes, are particularly suited for transportation in containers.

Intermodal transportation has given rise to numerous service providers devoted not actually to moving cargo, but to the support and facilitation of transportation in a variety of ways. MULLER at 129-40. Among other services these companies provide is the consolidation of many small shipments into large consignments for more economical shipping. JOHN J. COYLE ET AL., *Transportation* 244 (2000). International Cargo Control Pty Ltd., (ICC), the company engaged by respondent to ship its goods, is one such service provider.

Marrying up of sea and land transport has proved to be an effective means of greatly enhancing transportation effic-

[3] In the 1970s and 1980s, a number of corporate acquisitions were undertaken with the aim of creating companies with multi-modal capabilities. MCKENZIE at 47-54.

iency, largely because it permits avoidance of circuitous and lengthy ocean routes. Rather than having to route an ocean carrier to the port nearest the final destination, a container ship may head for a more convenient port of call where cargo can be loaded onto fast, dedicated trains bound for an inland destination, thereby shortening overall delivery time of international freight movements. Even where the final destination is a U.S. port and an all-water route is feasible, efficiency may call for the final leg of the move by land. MULLER at 106-107. North American railroads also play an important role in shipments that do not originate or terminate in North America. So-called "bridge" service may involve ocean carriage from Asia to a west coast port, and from the east coast to Europe, linked by transcontinental land-based transportation. MULLER at 104-105; COYLE at 245-46.

Railroads serve all the major ports ringing the U.S. coast line from Boston to Seattle-Tacoma, connecting these ports to numerous inland locations. As a result, railroads play a key role in the movement of international freight, originating much export traffic, and serving as intermediary or destination carriers for large volumes of import traffic. Railroads derive approximately $3 billion in annual revenue moving import traffic in several million containers.

B. Highly Efficient Means of Conducting "Through" Transportation Have Developed to the Benefit of International Shippers

International cargo shipments usually involve multiple modes of transportation, as well as providers of associated services, who perform different roles, often spanning thousands of miles. See *Carman Tool & Abrasives, Inc. v. Evergreen Lines*, 871 F.2d 897, 900 (9th Cir. 1989) ("Intermodal shipping transactions are relatively complex. The parties usually include the seller, one or more freight forwarders, a carrier, a consignee, as well as several banks

and insurers."); *See also* Stephen G. Wood, *Multimodal Transportation: An American Perspective on Carrier Liability and Bill of Lading Issues*, 46 Am. J. Comp. L. 403, 404 (1998). However, despite their inherent complexities, these transactions all have the straightforward goal of moving freight between two points. Shippers of cargo have an interest in making arrangements for a complete transaction, *i.e.*, shipment from origin to final destination, with all necessary transportation and associated services provided. With this aim in mind, the details of who is performing each aspect of the service is of lesser importance.

Given the various components that make up a "through" international move, arranging for the transportation typically involves a series of commercial transactions in which each party is not directly involved in the arrangement of each transaction. This case was typical in that respect: respondent Kirby, the Australian cargo owner who shipped goods from Sydney, never negotiated a contract with petitioner, the U.S. railroad that undertook to ship the goods during the inland portion of the move to its final destination, Huntsville, Alabama. Nor would doing so have been even remotely feasible. Ultimately, however, respondent sued petitioner for damage to the cargo occurring during the inland move.

The series of transactions entered into in this case were unremarkable, indeed, were typical, of international commerce. Cargo owners do not enter into individual relationships with numerous parties providing various aspects of the service, some of whom may be located on different continents. Instead, they usually will entrust their goods directly to a vessel carrier who is responsible for providing or arranging for the transportation and other services needed to move the goods to their final destination, or to a freight forwarder that will contract in its own name with a vessel carrier to provide transportation. At the other end, railroads enter into arrangements with ocean carriers calling on U.S.

ports, agreeing to transport cargo that is off-loaded from the carriers' ships, under the ocean carriers' through bill of lading, without regard to the identity of the individual shipper or the contents of individual containers.

These types of arrangements allow business to be conducted efficiently, obviating the need for foreign shippers to locate and contract with a land-based U.S. carrier for each shipment it wishes to move. The ability to consolidate freight of numerous cargo owners and arrange for through transportation to destination, utilizing multiple carriers, some of whom the foreign freight forwarder need not directly contact, is tremendously beneficial to shippers worldwide. In addition to relieving the shipper of the need to enter into numerous discrete arrangements, the ability to tender large volumes of freight enables the freight forwarder to obtain better rates than could individual shippers who often may be attempting to ship small volumes of cargo. "The services provided by third parties allow shippers to enjoy lower intermodal rates, while at the same time relieving carriers of the burden of freight consolidation and providing sufficient volumes to make intermodal shipments worthwhile." McKENZIE at 209.

Regardless of the details of a particular transaction, it is the general practice that a party other than the foreign shipper will make the arrangement that will result in the shipper's goods being placed on a train for inland transport in the United States. It goes without saying that a single entity does not (and cannot) transport goods both by sea and land, and also provide all the loading and unloading services as needed. But the fact remains that these are all pieces of the unitary service sought by the shippers wishing to move cargo from a specific origin point to a specific destination point. International shippers certainly contemplate that when they enter into a contract to move their goods, they are contracting for

services which inevitably will be performed by several parties, some located in different countries and continents.

C. Contractual Limits on Liability Supplemented By Insurance is the Most Economically Rational Way of Conducting Business and Typical of International Transportation Transactions

Liability for damage to or loss of the cargo is an area that is addressed by transportation contracts. In this case, liability limitations for loss of the goods established by the Carriage of Goods by Sea Act (COGSA),[4] and the scope of their applicability, were set forth in the bill of lading issued by the ocean carrier in the course of the underlying transaction. COGSA presents a choice of accepting statutory liability limits or declaring a higher value, a choice that is fully appreciated by "[m]ost shippers (who are sophisticated commercial parties, working with experienced freight forwarders)." Michael F. Sturley, *Carriage of Goods by Sea*, 31 J. Mar. L. & Com. 241, 244 (2000). The option of declaring full value is almost never exercised because of the higher freight rates that would accompany such a declaration. Instead, the shipper, accepting the carrier's limited liability, will choose to insure the cargo for its full value, almost invariably a less costly option.

Kirby likewise declined to declare a higher value, exercising the choice to accept the lower freight rate, and therefore accepting as well the limitation on liability, relying

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[4] Ch. 229, 49 Stat. 1207 (1936), codified at 46 U.S.C. app. §§1300-1315. Among other things, COGSA establishes limits on liability when a lading is damaged during transportation by ocean carrier. Absent declaration of a higher value for the cargo, liability is limited to $500 per package, 46 U.S.C. app. §1304(5), a limitation which, by contractual provisions known as Himalaya clauses, may be extended to other parties participating in the transportation. *Id.* at §1307. *Generali v. D'Amico*, 766 F.2d 485, 487-88 (11th Cir. 1985).

on insurance for protection against any outstanding risk. "In contracting, Kirby was given the opportunity to declare a value in excess of $500.00 and to obtain higher coverage for its cargo, paying an additional ad valorem rate charge for the shipment. Instead, Kirby separately insured its cargo with its co-plaintiff, MMI General Insurance, Ltd." *Kirby v. Norfolk Southern Ry. Co.*, No. 1:98RCV-2939-CAP (N.D. Ga., order of Oct. 11, 2000).

Not only did Kirby's choice make commercial sense,[5] it constituted what is seen as the most rationale and efficient means of doing business. The shipper, with whom the traffic originates, knows exactly what is being shipped and the shipment's value. The carriers, particularly a railroad situated a continent away that has arranged to accept numerous containers without individualized inquiry as to the specific nature of the goods contained therein or the identity of the particular shipper of the goods, generally are not in a position to ascertain the goods' value. Shipments remain in their containers, unopened until the final destination is reached. Thus, the shipper is in the best position to determine whether to declare a high value or to insure, and at what level. Similarly, insurers who underwrite this insurance know they are insuring a risk for which other parties' liability is limited.

As is common, the Himalaya clause in the bill of lading expressed an intent to extend COGSA's limitations on liability to all parties performing services under the transportation contract. Enforcing the terms of the transportation contract, the district court granted partial summary judgment to petitioner, holding that the liability limitations contained in the bill of lading issued by Hamburg Sud, the ocean carrier,

[5] "[V]irtually no sensible shipper would declare a higher value—no matter how clearly the opportunity to do so is presented–because the ad valorem freight charge that would be triggered by a declaration is almost invariably higher than the premium that a cargo underwriter would charge for insuring the same shipment." Sturley at 244.

to ICC, Kirby's freight forwarder, limited petitioner's liability to Kirby.[6] The district court did not address whether the bill of lading issued by ICC to Kirby benefitted petitioner, as it ruled that the Hamburg Sud/ICC bill of lading was "the applicable bill to the instant dispute."

Viewing the case as involving a series of atomized transactions, the Court of Appeals reversed, ruling that petitioner could not avail itself of the benefits of either bill of lading: according to the court, the Hamburg Sud/ICC bill which, the court acknowledged, protected petitioner, did not bind Kirby, and the ICC/Kirby bill that bound Kirby did not protect petitioner. *Kirby v. Norfolk Southern Ry. Co.*, 300 F.3d 1300 (11th Cir. 2002). The court held that the Hamburg Sud bill of lading did not bind Kirby because ICC, the intermediary who contracted to ship Kirby's freight, did not act as an agent. *Id.* at 1305-07. At the same time, all but ignoring the words used by the parties, the court held that while the Himalaya clause in the bill of lading issued by ICC to Kirby did bind Kirby, its extension to "any independent contractors whose services have been used in order to perform the contract" was not sufficiently specific to benefit petitioner.

[6] The Himalaya clause in the Hamburg Sud/ICC bill of lading extended the COGSA limits to, among others, "inland carriers."

II. THE ELEVENTH CIRCUIT'S DECISION MISAPPLIES THE LAW AND COMPLETELY IGNORES WELL-ESTABLISHED AND ECONOMICALLY EFFICIENT COMMERCIAL PRACTICES

A. Economically Inefficient Alternative Ways of Conducting International Commerce Will Be the Invariable Outcome of Affirming the Eleventh Circuit's Decision

The Eleventh Circuit's holding, utilizing an agent/principle analysis divorced from over a century of common carrier law, departs from the principles that this Court has applied where the owner of goods authorizes another party to ship the goods. In fact, the agency analysis the court deemed pivotal is irrelevant. Just as the "transfer company" in *Great Northern Ry. Co. v. O'Connor*, 232 U.S. 508 (1914), ICC "had been intrusted [by Kirby] with goods to be shipped." *Id.* at 514. Therefore, contrary to the Eleventh Circuit's reasoning, the carrier receiving the goods from ICC had "the right to assume that the transfer company could agree upon the terms of the shipment" regardless of whether the transfer company "be treated as agent or forwarder." *Id.* If permitted to stand, the Eleventh Circuit's ruling will empower shippers to disavow any contractual obligations that, as a commercial practice built on the foundation of this Court's unbroken precedent,[7] are entered into on their behalf by a freight forwarder whom the shipper authorizes to arrange transportation, to the detriment of downstream parties who are intended beneficiaries of the contract terms.

[7] *See New Jersey Steamship Navigation Co. v. Merchant's Bank*, 47 U.S. (6 How.) 344 (1848); *York Co. v. Cent. R.R.*, 70 U.S. (3 Wall..) 107 (1865); *Michigan Cent. R.R. v. Mark Owen & Co.*, 256 U.S. 427 (1921); *Chicago, Milwaukee, St. Paul & Pac. R.R. v. Acme Fast Freight, Inc.*, 336 U.S. 465 (1949). Petitioner's brief fully sets forth how this Court has viewed the contractual obligations that arise when a party entrusts its goods to another party. AAR will not repeat those arguments here.

Other courts of appeals have recognized that such a result ill serves the needs of international commerce and flies in the face of expectations generated by commercial norms. *E.g., Kukje Hwajae Ins. Co. v. M/V Hyundai Liberty*, 294 F.3d 1171, 1176-77 (9th Cir. 2002)(In accordance with "comm.-ercial norms" a shipper was bound by the terms of a bill of lading issued by an ocean carrier to the shipper's intermediary who, like ICC, had the duty and authority to provide carriage for the shipper's goods, and to do "whatever it needed to do in order to fulfill that obligation.") ; *Stolt Tank Containers, Inc. v. Evergreen Marine Corp.*, 962 F.2d 276, 279 (2nd Cir. 1992). (If the claim of a shipper that it is not bound by the bill of lading between its intermediary and a carrier is accepted, "a carrier, to avoid expanded liability, would have to contract to limit liability not only with the party with whom it actually dealt, but also with all others who might possess an interest in the shipped goods."); *Carman Tool* ("It would be next to impossible for a carrier to give actual notice of the liability limitations to everyone a court might later hold has a foreseeable economic interest in the goods. It could also substantially delay shipment . . ." 871 F.2d at 901). *See also Nippon Fire & Marine Ins. Co., Ltd. v. Skyway Freight Sys., Inc.*, 235 F.3d 53, 61-62 (2nd Cir. 2000)(Shipper bound by liability limitations in contracts between primary and secondary carriers).

Railroads take into account the very custom and practice, and commercial norms, that these decisions recognize when undertaking arrangements of their own role in international transportation. In contracting with ocean carriers, railroads establish rates under which they will ship the goods with the expectation that, as is customary, the ocean carriers from whom the goods are accepted have taken on limited liability and, through Himalaya clauses, have passed those limits

along to inland carriers. If the arrangements that have served historically to limit railroad liability become inoperative when a freight forwarder enters the picture, railroads will no longer be able to enter into international transportation arrangements with assurance they have foreclosed exposure to unforeseen and unpredictable liability to unknown parties. Consequently, they may be compelled to require from the prior party a defensive indemnity against liability in excess of the contractual limit set forth in their own contracts. In turn, the other parties involved in the ocean movement of the lading may take similar action. The creation of these linked indemnities will result in a cascade of parties being drawn into litigation if the shipper/insurer is able to bypass the freight forwarder's/ocean carrier's limitations of liability and proceed against the railroads or some other party involved in the transportation for excess recoveries.

Other alternatives are even less attractive and, like the indemnity option, will lead to serious economic inefficiencies. Given the nature of international shipments, it would be highly impractical to expect railroads to find a way to contract directly with parties with whom they would not ordinarily deal, which respondent suggests as an option for railroads wishing to assure they will benefit from the protection of liability limitations or other terms, a proposition of questionable feasibility and likely considerable expense.[8] This is precisely the reason that most courts have recognized that it is counterproductive to adhere to the fiction that the shipper is not bound by the terms of a bill of lading issued to the freight forwarder that has been engaged to arrange transportation for that shipper's goods.

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[8] See Resp. Br. in Opp. to Pet. at 21. Respondent also suggested that railroads forego participation in multimodal transactions. This would reduce competition in the inland phase of international commerce, an option that would be destructive of fundamental public policy, and, which for obvious reasons AAR's members will decline.

B. The Eleventh Circuit's Unduly Narrow Reading of the ICC Bill of Lading Cannot Be Squared With Either the Contract's Words or the Obvious Realities of the Underlying Transaction

Though the bill of lading between ICC and Kirby did not serve as the basis for the district court's grant of partial summary judgment, it too can only be reasonably interpreted to benefit petitioner. However, notwithstanding that petitioner did provide "services used to perform the contract," the Eleventh Circuit reasoned that petitioner was not covered by that phrase because it did not contract (was not in privity) with the carrier (freight forwarder). 300 F.3d at 1308-10. In reaching this decision, the distinction posited by the Eleventh Circuit between "relational" terms and "descriptive" terms when used in a Himalaya clause turns a blind eye to the business realities of this case and international commerce in general. When a contract of carriage by its very nature calls for both ocean and land transportation, it is well within the contemplation of the contracting parties that, of necessity, the subcontractors involved will include a land-based carrier like a railroad. A contract that plainly extends liability limitations (or any terms) to other parties that will be performing the services contemplated by the contracting parties—in this case, shipment of cargo from Australia to (inland) Alabama—must be enforced in accordance with a reasonable understanding of its terms if established means of doing business are to be maintained.

Notwithstanding this Court's admonition that Himalaya clauses should be narrowly construed, *Robert C. Herd & Co. v. Krawill Mach Corp.*, 359 U.S. 297 (1959), a distinction must be recognized between construing a clause narrowly by limiting it to the reasonable meaning of the words used and interpreting a clause contrary to the intent and expectations of the parties. There is no rational basis for reading petitioner, a

railroad, out of the Himalaya clause through a privity requirement. The railroad was not a remote entity whose involvement was too far removed to be contemplated by the parties. Rather, the railroad was an essential party that was fully contemplated by the shipper, and without which the services could not have been completed. As Judge Siler, whose dissent properly recognized the commercial realities of multimodal international transportation, pointed out: "When the bill of lading between Kirby and ICC was issued, Kirby knew that an inland carrier would have to be used, because of the destination being Huntsville, Alabama." 300 F.3d at 1312. Given this clear understanding, the Eleventh Circuit's privity requirement is properly seen as an artificial technicality that subverts the intent of the parties and undermines the effectiveness of the prevailing means by which carriers and shippers generally conduct their business.

Any cargo owner that wishes to ship its goods to an inland location on the other side of the globe enters into the transportation contract with full appreciation of the kinds of services that will be required to complete the transportation. With this appreciation, Kirby chose to decline to declare a value for its goods and pay a higher freight rate, opting instead to insure the goods for their full value. These decisions were reflected in both bills of lading which were the subject of the Eleventh Circuit's opinion.

This Court should issue a ruling that will hold parties shipping goods in international commerce to the bargains they enter into. Shippers should not be empowered to opt for lower rates, and the associated liability limitations, by failing to declare a higher value of the goods shipped, but to then avoid the consequences of those decisions by seeking full recovery from downstream carriers.[9] Such a ruling would

[9] In actuality, such a ruling is most likely to prevent maritime insurers from reaping a windfall by evading the contractual limitations on damages against which they insured the shippers and upon the basis of which they establish their premiums. *See Carman Tool*, 871 F.2d at 901, n. 10.

properly avoid placing on downstream carriers the untenable burden of policing bills of lading over which they have no opportunity to negotiate or the nearly impossible task of ascertaining the nature and value of all the containerized goods they ship.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted

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